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Supreme Court, U.S.
FILED
96 464 SEP 23 1996
No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

JACKIE RAY CLINE,

Petitioner,

vs.

GEORGE W. ROGERS, individually, and in his capacity as Sheriff of McMinn County, and McMINN COUNTY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an individual's privacy interests in criminal history information stored in a government data bank is constitutionally protected.

II. Whether misuse of information collected in a government data bank violates an individual's constitutionally protected privacy interests.

III. Whether 42 U.S.C. § 3789g, which controls the use of criminal history information, creates enforceable rights to be free from unwarranted disclosure of such information.

IV. Whether individuals have a cause of action under 42 U.S.C. § 1983 for violations of 42 U.S.C. § 3789g.

V. Whether 42 U.S.C. § 3789g creates an implied cause of action for unwarranted disclosure of criminal history information.

VI. Whether *sua sponte* dismissal is permissible when the party being dismissed did not receive prior notice of the intention of the court to dismiss and the opportunity to respond prior to dismissal.

LIST OF PARTIES

The names of all parties to the proceedings in the Court below appear in the caption of this case. No party has a parent or subsidiary company.

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OPINIONS BELOW

The Opinion of the Court of Appeals has been recommended for publication. Its electronic citation is 1996 Fed. App. 0182p (6th Cir.). It is reproduced in the Appendix (App.) at 1a. The Order and Judgment of the District Court is reproduced at 19a, and the unpublished Memorandum is at 21a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The two statutes of primary concern in this case are 42 U.S.C. § 3789g and 42 U.S.C. § 1983.

I. All subsections of 42 U.S.C. § 3789g are set out below:

> (a) **Research or statistical information; immunity from process; prohibition against admission as evidence or use in any proceedings**
>
> Except as provided by Federal law other than this chapter, no officer or employee of the Federal Government, and no recipient of assistance under the provisions of this chapter shall use or reveal any research or statistical information furnished under this chapter by any person and identifiable to any specific private person for any purpose other than the purpose for which it was obtained in

accordance with this chapter. Such information and copies thereof shall be immune from legal process, and shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action, suit, or other judicial, legislative, or administrative proceedings.

(b) **Criminal history information; disposition and arrest data; procedures for collection, storage, dissemination, and current status; security and privacy; availability for law enforcement, criminal justice, and other lawful purposes; automated systems: review, challenge, and correction of information.**

All criminal history information collected, stored, or disseminated through support under this chapter shall contain, to the maximum extent feasible, disposition as well as arrest data where arrest data is included therein. The collection, storage, and dissemination of such information shall take place under procedures reasonably designed to insure that all such information is kept current therein; the Office of Justice Programs shall assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes. In addition, an individual who believes that criminal history information concerning

him contained in an automated system is inaccurate, incomplete, or maintained in violation of this chapter, shall, upon satisfactory verification of his identity, be entitled to review such information and to obtain a copy of it for the purpose of challenge or correction.

(c) **Criminal intelligence systems and information; prohibition against violation of privacy and constitutional rights of individuals.**

All criminal intelligence systems operating through support under this chapter shall collect, maintain, and disseminate criminal intelligence information in conformance with policy standards which are prescribed by the Office of Justice Programs and which are written to assure that the funding and operation of these systems furthers the purpose of this chapter and to assure that such systems are not utilized in violation of the privacy and constitutional rights of individuals.

(d) **Violations; fine as additional penalty.**

Any person violating the provisions of this section, or of any rule, regulation, or order issued thereunder, shall be fined not to exceed $10,000, in addition to any other penalty imposed by law.

42 U.S.C. § 3789g (1989).

II. 42 U.S.C. § 1983 states:

> Every person who, under color of any stature, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1979).

STATEMENT OF THE CASE

In late 1992, a private citizen asked Sheriff George W. Rogers to access criminal history records of Jackie Ray Cline to find out if he had ever been arrested. Access to criminal records is controlled and protected by 42 U.S.C. § 3789g. Such information may be used only for law enforcement and similarly related official business. 42 U.S.C. § 3789g(c). Unlawful access is punishable by fine, "in addition to any other penalty imposed by law." 42 U.S.C. § 3789g(d). Sheriff Rogers conducted a state and local search and then requested a computer search of the FBI's National Crime Information Center (NCIC) records. Sheriff Rogers conveyed the information obtained from the searches to the private citizen who had requested the information for private use, unrelated to law enforcement.

This action was brought under 42 U.S.C. §§ 1983 and 3789g for violation of Jackie Ray Cline's rights. Cline also asserted an implied private cause of action under 42 U.S.C. § 3789g as well as state and federal constitutional rights to privacy. The complaint was filed in the U. S. District Court for the Eastern District of Tennessee, Southern Division, on September 13, 1993. Jurisdiction was appropriate under 28 U.S.C. §§ 1331 and 1343(a)(3).

On November 4, 1993, McMinn County moved to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), claiming only that 42 U.S.C. § 3789g does not provide private rights that can be enforced under 42 U.S.C. § 1983. McMinn County did not address the other claims in the complaint. Sheriff Rogers never filed a Motion to Dismiss.

On September 12, 1994, the Honorable R. Allan Edgar, United States District Judge, entered a judgment granting McMinn County's Motion to Dismiss. App. at 19a. Judge Edgar also dismissed, *sua sponte* with prejudice, all of Cline's other claims against McMinn County as well as all his claims against Sheriff Rogers. *Id.* Judge Edgar gave Cline's attorneys no notice that he intended to dismiss the latter claims. App. at 34a.

On October 3, 1994, Cline filed a timely Notice of Appeal. Appellate jurisdiction was based on 28 U.S.C. § 1291. On June 25, 1996, the United States Court of Appeals for the Sixth Circuit affirmed, holding that

(1) there is no constitutional right to privacy in one's criminal record (App. at 4a);

(2) Tennessee does not recognize a private cause of action for violations of the Tennessee Constitution (App. at 5a);

(3) there is no implied cause of action under 42 U.S.C. § 3789g for unwarranted disclosure of criminal history information (App. at 11a);

(4) 42 U.S.C. § 1983 cannot be used to enforce rights under 42 U.S.C. § 3789g because § 3789g does not provide a privately enforceable federal right to nondisclosure of criminal history information (App. at 16a); and

(5) it was not an abuse of discretion for the District Court to dismiss Cline's complaint without first hearing oral argument (App. at 18a).

REASONS FOR GRANTING THE WRIT

There are several reasons for granting this writ. First, this Court reserved the question whether an individual's privacy rights in criminal history information collected in a government data bank are constitutionally protected. *See U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762-763, 109 S. Ct. 1468, 1476, 103 L. Ed. 2d 774 (1989). Second, there is an apparent split among the courts of appeals on the question whether misuse of information collected in government data banks violates an individual's constitutional rights to privacy. This question was reserved in *Whalen v. Roe*, 429 U.S. 589, 605-606, 97 S. Ct. 869, 879-880, 51 L. Ed. 2d 64 (1977). Finally, this Court should grant the writ to correct misapplications of the law, which to date have been made by two courts of appeals.

The misuse of information collected in government data bases is a national concern. Earlier this month, five former White House employees brought a $90-million class-action lawsuit in federal district court against Hillary Rodham Clinton, the FBI, and others, claiming invasion of privacy in the

alleged mishandling of FBI data files. *Alexander v. FBI*, No. 1:96 CV 02123(R)(C)(L) (D.C.D.C. filed September 12, 1996). The issue is of equal importance to a citizen of McMinn County, Tennessee, when the Sheriff uses his access to FBI data files to assist private citizens for private use rather than for legitimate law enforcement purposes.

Misuse of criminal justice information collected in computer data bases has recently been the subject of congressional inquiry. Government law enforcement agencies collect and maintain detailed records about citizens, ostensibly for state and national security and general law enforcement purposes. Much of this information is deeply private and, if exposed, could profoundly affect a person's ability to hold a job, earn a living, or, in general, be treated fairly under the law. Although misuse is prohibited under federal law, the law is rarely enforced.

I.

AN INDIVIDUAL'S PRIVACY INTERESTS IN CRIMINAL HISTORY INFORMATION STORED IN A GOVERNMENT DATA BANK IS CONSTITUTIONALLY PROTECTED.

Even though 42 U.S.C. § 3789g(c) states that it is concerned about the "privacy and constitutional rights of individuals," the Sixth Circuit Court of Appeals held in this case that there is no constitutional right to privacy in one's criminal record. App. at 4a.

Although the Supreme Court previously determined that compiled criminal history information is private data, it reserved the question whether such data is constitutionally protected in *U.S. Dept. of Justice v. Reporters Comm. for*

Freedom of the Press, 489 U.S. 749, 762-763, 109 S. Ct. 1468, 1476, 103 L. Ed. 2d 774 (1989).

In *Reporters Committee*, the Court was asked to decide whether the Freedom of Information Act prevented the disclosure of FBI rap sheets (information similar to that disclosed in the instant case) to the press because disclosure violated an individual's right to privacy as envisioned by the statute. While reserving the "question whether an individual's interest in privacy is protected by the Constitution" (*id.* at 762, n. 13), the Court stated:

> [T]he issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interests implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse for information.

Id. at 764. The Court went on to say:

> When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation . . . the privacy interest . . . is . . . at its apex. . . . Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that

> citizen's privacy, and that when the request seeks . . . merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."

Id. at 780.

Because *Reporters Committee* dealt with a statute rather than a constitutional invasion of privacy, the Court declined to decide the constitutional question. Nonetheless, the Court's rationale implies that criminal history information in a government data bank is constitutionally protected. Given that the question is a significant one and the Court has reserved it, the Court should grant the writ.

II.

MISUSE OF INFORMATION COLLECTED IN A GOVERNMENT DATA BANK VIOLATES AN INDIVIDUAL'S CONSTITUTIONALLY PROTECTED PRIVACY INTERESTS.

Although criminal records stored in the NCIC data base are protected by law from unwarranted disclosure, the Sixth Circuit Court of Appeals held that Cline did not have a constitutional right to privacy in his criminal record. App. at 4a. The Fifth Circuit Court of Appeals, however, apparently would disagree. In *Fadjo v. Coon*, the court held that Fadjo had a constitutional right to privacy in information he provided in a criminal investigation; the information was revealed to others not involved in the investigation. *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981). While the information released in *Fadjo* was not "official information," nevertheless, the court was careful to distinguish the case from an earlier case, *Tosh v. Buddies Supermarkets, Inc.*, 482 F.2d 329 (5th Cir. 1973),

involving the release of an arrest record. The court noted that in *Tosh* there was no constitutional violation "because the court found a legitimate state purpose in the limited dissemination of the information." *Fadjo*, 633 F.2d at 1177. Thus if the release of arrest records had not been for a legitimate state purpose in *Fadjo*, the court apparently would have found a constitutional violation.

To date, the Supreme Court has not decided the question whether misuse of information in government data banks violates an individual's constitutionally protected privacy interests. In *Whalen v. Roe*, however, the court reserved the question while recognizing that in some cases there may be a constitutional violation:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the *enforcement of the criminal laws* all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances *that duty arguably has its roots in the Constitution*, nevertheless New York's statutory scheme, and its

> implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data whether intentional or unintentional or by a system that did not contain comparable security provisions.

Whalen v. Roe, 429 U.S. 589, 605-606, 97 S. Ct. 869, 879, 51 L. Ed. 2d 64 (1977) (emphasis added).

Unlike the facts in *Whalen*, the facts in the instant case clearly address the constitutional issue. The issue is fundamental.

Moreover, each of the cases the Court of Appeals relied on in reaching its holding in this case involved situations in which there was a legitimate state interest in releasing the information considered private. App. at 4a, citing *Whalen v. Roe*, *Paul v. Davis*, 424 U.S. 693 (1976), *Nixon v. Administrator*, 433 U.S. 425 (1977), and *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981). These cases are therefore clearly distinguishable. Since the issue in the case at bar involves unwarranted disclosure of protected information, this case should be addressed by this Court.

III.

42 U.S.C. § 3789g, WHICH CONTROLS THE USE OF CRIMINAL HISTORY INFORMATION, CREATES ENFORCEABLE RIGHTS TO BE FREE FROM UNWARRANTED DISCLOSURE OF SUCH INFORMATION.

In his brief to the Sixth Circuit Court of Appeals, Cline argued that certain subsections of 42 U.S.C. § 3789g clearly create enforceable rights[1] and that when all subsections are read together, they create enforceable rights to be free from unwarranted disclosure of criminal history information. Without addressing whether the statute as a whole creates enforceable rights, the Court of Appeals held that § 3789g(b), which addresses criminal history information specifically, was the only applicable subsection in the instant case and that it does not create enforceable rights. App. at 16a.

The Department of Justice regulations carrying out the policy of § 3789g, however, state that an individual's right to privacy prohibits illegal access to "criminal history information" and that governmental units are prohibited from misusing such information. For instance, 28 C.F.R. § 20.1 states:

> It is the purpose of these regulations to assure that *criminal history record information* wherever it appears is collected, stored, and disseminated in a

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1. In *Polchowski v. Gorris*, the Seventh Circuit Court of Appeals held that because 42 U.S.C. § 3789g(a) seeks "to protect the privacy of a class of individuals from disclosure by any person," it creates enforceable rights. *Polchowski*, 714 F.2d 749, 752 (7th Cir. 1983).

> manner to insure the completeness, integrity, accuracy and security of such information and to *protect individual privacy*.

28 C.F.R. § 20.1 (July 1, 1994) (emphasis added). 28 C.F.R. § 20.21(c)(2) states:

> No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.

28 C.F.R. § 20.21(c)(2) (July 1, 1994). Thus, according to the regulations, § 3789g protects "the privacy of a class of individuals from disclosure by any person" and therefore, according to *Polchowski*, creates enforceable rights. *Polchowski*, 714 F.2d at 752.[2]

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2. Courts have generally adopted a three-part test for determining whether a statute creates enforceable rights:

(1) Was the provision in question intended to benefit the plaintiff?

(2) Does the statutory provision in question create binding obligations on the defendant governmental unit, rather than merely expressing a congressional preference? and

(3) Is the interest the plaintiff asserts specific enough to be enforced judicially?

Wood v. Tompkins, 33 F.3d 600, 604 (6th Cir. 1994); *Wilder v. Virginia Hosp. Assoc.*, 496 U.S. 498, 509, 110 S. Ct. 2510, 2517, 110 L. Ed. 2d 455 (1990). Subsection 3789g(b) can easily satisfy this test. For example, § 3789g(b) was clearly intended to benefit the plaintiff. § 3789g(b) states that "the Office of

(Cont'd)

When these regulations are taken into consideration with the enforcement subsection § 3789g(d), which states that "[a]ny person violating the provisions of this section, or of any rule, *regulation*, or order issued thereunder, shall be" subject "to any other penalty imposed by law," they add up to the conclusion that the Department of Justice would consider that Cline has an enforceable right. *See* 42 U.S.C. § 3789g(d) (emphasis added).[3]

This Court has held that while an enforcing agency's interpretation of a statute is ordinarily given important but not

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(Cont'd)
Justice Programs *shall* assure that the security and *privacy* of all [criminal history] information is adequately provided for and that information *shall* only be used for law enforcement and criminal justice and other lawful purposes." 42 U.S.C. § 3789g(b) (emphasis added). Secondly, as the language cited above shows, the governmental entities are clearly bound to refrain from releasing private information. Note that in each case, Congress used the verb "shall." *Cf. Wood v. Tompkins*, 33 F.3d 600, 605 (6th Cir. 1994) (the provision "is cast in mandatory rather than precatory terms"). Finally, the individuals' interests are stated specifically enough to be judicially enforced. The enforcement provision, which is contained in § 3789g(d), states that any person violating the provisions of this section "shall be fined not to exceed $10,000, in addition to any other penalty imposed by law." 42 U.S.C. § 3789g(d).

3. The Department of Justice's interpretation should carry significant weight with the courts. For example, in interpreting Title VII of the Civil Rights Act of 1964 to determine whether that Act created a cause of action for sexual harassment, the United States Supreme Court examined mere guidelines issued by the Equal Employment Opportunity Commission declaring that the Act created a cause of action for sexual harassment. The Court noted: "As an 'administrative interpretation of the Act by the enforcing agency' . . . these Guidelines, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience to which courts and litigants may properly resort for guidance'. . . ." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49 (1986) (citations omitted).

controlling significance, regulations have legislative effect when Congress has entrusted the agency with the power to issue the regulations. *Batterton v. Francis*, 432 U.S. 416, 425, 97 S. Ct. 2399, 2405, 53 L. Ed. 2d 448 (1977). Congress granted such legislative power to the Department of Justice in the enactment of § 3789g when it stated that "Any person violating the provisions of this section, or of any rule, *regulation*, or order issued thereunder, shall be fined not to exceed $10,000, in addition to any other penalty imposed by law." 42 U.S.C. § 3789g(d) (emphasis added).

Thus § 3789g does create enforceable rights "to protect individual privacy" in "criminal history record information." 28 C.F.R. § 20.1.

The Sixth Circuit Court of Appeals countered this argument by stating that the regulations also provide: "Nothing in these regulations prevents . . . [sic] a criminal justice agency . . . from confirming prior criminal history record information to members of the news media *or any other person*, upon specific inquiry as to whether a named individual was arrested, detained, indicted, or whether an information or other formal charge was filed . . . ." 28 C.F.R. § 20.20(c) (emphasis added in the Court of Appeals' opinion). The quote, however, was taken out of context. The Court of Appeals left out the final critical clause of the last sentence in the quote, which nullifies their rationale. With the last clause added, the quote reads:

> Nothing in these regulations prevents a criminal justice agency . . . from confirming prior criminal history record information to members of the news media or any other person, upon specific inquiry as to whether a named individual was arrested, detained, indicted, or whether an information or other

> formal charge was filed, on a specific date, *if the arrest record information or criminal record information disclosed is based on data excluded by paragraph (b) of this section.*

28 C.F.R. § 20.20(c) (emphasis added). Thus the only prior criminal history information that can be released to "any other person" is criminal history information that is excluded under paragraph (b), which includes:

> (1) Posters, announcements, or lists for identifying or apprehending fugitives or wanted persons;
>
> (2) Original records of entry such as police blotters maintained by criminal justice agencies, compiled chronologically and required by law or long standing custom to be made public, if such records are organized on a chronological basis;
>
> (3) Court records of public judicial proceedings;
>
> (4) Published court or administrative opinions or public judicial, administrative or legislative proceedings;
>
> (5) Records of traffic offenses maintained by State departments of transportation, motor vehicles or the equivalent thereof for the purpose of regulating the issuance, suspension, revocation, or renewal of driver's, pilot's or other operators' licenses;

(6) Announcements of executive clemency.

28 C.F.R. § 20.20(b).

Obviously, the items excluded under 28 C.F.R. § 20.20(b) do not include criminal history information stored in the NCIC data base. For information in the NCIC data base, the prohibition is clear:

> No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.

28 C.F.R. § 20.21(c)(2).

Having misconstrued 28 C.F.R. § 20.20(c), the Court of Appeals then sought to bolster its rationale by saying that Congress provided an administrative remedy to redress violations through the Privacy Act, 5 U.S.C. § 552a, and that this remedy is further proof that Congress did not intend to create enforceable rights. Add. at 13a. This is the same rationale that the Seventh Circuit Court of Appeals used in *Polchowski*, 714 F.2d at 752, to justify not allowing private enforcement of § 3789g. Both Courts of Appeals, however, have misapplied the law because 28 C.F.R. 16.96(g) plainly states that NCIC records are exempt from the civil remedies of the Privacy Act. No other court of appeals has addressed this issue.

Thus, when all the subsections of § 3789g are read together, and especially when they are read with the implementing regulations, it is clear that § 3789g creates enforceable rights for unwarranted disclosure of criminal history information.

IV.

INDIVIDUALS HAVE A CAUSE OF ACTION UNDER 42 U.S.C. § 1983 FOR VIOLATIONS OF 42 U.S.C. § 3789g.

Having determined that there are no enforceable rights available to Cline under 42 U.S.C. § 3789g, the Sixth Circuit Court of Appeals then concluded that any cause of action he might claim under 42 U.S.C. § 1983 must necessarily fail. App. at 16a. As indicated in Argument III above, however, Cline does have enforceable rights under § 3789g. Thus he should be able to enforce his right under § 1983 provided Congress has not foreclosed enforcement in the statute itself. *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423, 107 S. Ct. 766, 770, 93 L. Ed. 2d 781, 788 (1987).[4]

In determining whether Congress foreclosed enforcement of a statute, courts must decide whether the statute provides a comprehensive set of remedies. *Middlesex County Sewage Authority v. National Sea Clammers*, 453 U.S. 1, 20, 101 S. Ct. 2615, 2626, 69 L. Ed. 2d 435, 450-451 (1981). As shown in Argument III above, both the Sixth and the Seven Circuit Courts of Appeals state that the Privacy Act provides remedies for unwarranted access to a person's NCIC records. The regulations to the Privacy Act, however, exempt NCIC records from the civil remedies section of the Act. 28 C.F.R.

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4. This Court recognizes only two exceptions to the use of 42 U.S.C. § 1983 to enforce federal statutory violations: "[W]here Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983." *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423, 107 S. Ct. 766, 770, 93 L. Ed. 2d 781 (1987). As Argument III above shows, the second exception does not apply because § 3789g does create enforceable rights.

§ 16.96(g). Therefore, the Privacy Act cannot provide a comprehensive remedy.

Because Cline has no other statutory remedies, Congress obviously did not foreclose enforcement through a comprehensive set of remedies. This Court, therefore, should grant the writ and clarify the law for Cline's benefit and the benefit of other similarly situated individuals.

V.

42 U.S.C. § 3789g CREATES AN IMPLIED CAUSE OF ACTION FOR UNWARRANTED DISCLOSURE OF CRIMINAL HISTORY INFORMATION.

If this Court determines, however, that Congress has created a comprehensive set of remedies for violations of 42 U.S.C. § 3789g, Cline contends he still has an implied cause of action under § 3789g for unwarranted disclosure of criminal history information. The Sixth Circuit Court of Appeals held that 42 U.S.C. § 3789g does not create an implied cause of action, App. at 11a, but Cline respectfully disagrees.

In *Cort v. Ash*, the Supreme Court set out a four-part test for determining whether a statute has an implied cause of action:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a

> remedy for the plaintiff? And finally, is the cause of actionone traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 2088, 45 L. Ed. 2d 26, 36-37 (1975) (emphasis in the original) (citations omitted).

As shown in Argument III above, 42 U.S.C. § 3789g creates enforceable rights and therefore satisfies the first part of the test. Second, Congress left open-ended the enforcement provisions contained in § 3789g(d): persons violating the act are subject to fine "in addition to *any other penalty imposed by law*." 42 U.S.C. § 3789g(d) (emphasis added). Thus an implied cause of action certainly fits within the parameters of what Congress would allow.

Third, § 3789g was established to protect criminal justice information. Moreover, the statute is specifically concerned about the "privacy and constitutional rights of individuals." 42 U.S.C. § 3789g(c). *See also*, 28 C.F.R. § 20.1 (July 1, 1994). Therefore, it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff." *Cort*, 422 U.S. at 78.

Finally, *Cort* asks if the cause of action is "one traditionally relegated to state law . . . ." *Id*. The answer here clearly is, no. The NCIC information illegally accessed in the present case is federal information and should appropriately be protected by federal law.

Based on the foregoing, Cline asserts 42 U.S.C. § 3789g meets the *Cort* test and therefore creates an implied cause of action.

VI.

SUA SPONTE DISMISSAL IS IMPERMISSIBLE WHEN THE PARTY BEING DISMISSED DID NOT RECEIVE PRIOR NOTICE OF THE INTENTION OF THE COURT TO DISMISS AND THE OPPORTUNITY TO RESPOND PRIOR TO DISMISSAL.

McMinn County moved to dismiss only Cline's 42 U.S.C. § 1983 claim for violation of 42 U.S.C. § 3789g. McMinn County ignored Cline's other claims. Without giving Cline prior notice and an opportunity to respond, the U.S. District Court judge dismissed not only the claim at issue, but also dismissed *sua sponte* all other claims against McMinn County as well as all claims against Sheriff Rogers. App. at 34a.

In affirming the District Court, the Court of Appeals said that "it was not an abuse of the district court's discretion to dismiss the complaint under Rule 12(b)(6) *without first hearing oral argument*." (Emphasis added.) App. at 18a. The Court of Appeals, however, misconstrued Cline's argument. Cline was not asking for the opportunity for "oral argument"; he was asking to present full written arguments on those other issues that his opponents had not asked to dismiss.

In Cline's response to McMinn County's Motion to Dismis he noted that because McMinn County addressed only one claim, Cline would respond to only that claim. He did not wish to be disadvantaged in arguing his case on the other claims until he had notice of Sheriff Rogers' and McMinn County's bases for dismissal. Cline responded to only the claim raised and waited to respond to the other claims until after McMinn County supplemented its Motion to Dismiss or Sheriff Rogers moved to dismiss. Cline should not be required to respond to arguments not made or motions not filed. McMinn County

never supplemented its Motion, and Sheriff Rogers never filed a Motion to Dismiss. As a result, Cline now finds himself in the untenable position of never having had a chance to respond to anyone, but nonetheless being out of court. *Cf. Tingler v. Marshall*, 716 F.2d 1109, 1111 (6th Cir. 1983) ("Plaintiffs are prejudiced by the procedure followed by the district court in this case because, unlike with motions to dismiss filed by defendants, they have no opportunity to amend their complaints or make legal arguments against the dismissal").

In *Morrison v. Tomano*, the Sixth Circuit Court of Appeals held that in a *sua sponte* dismissal, the plaintiff must "be given a chance to amend the complaint or respond to notice of an impending dismissal for failure to state a claim. *See Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)." *Morrison v. Tomano*, 755 F.2d 515, 517 (6th Cir. 1985). In the case at bar, however, the Court of Appeals denied Cline this right by saying simply that he was not entitled to oral argument. In so doing, the Court of Appeals denied Cline his legitimate rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: September, 23, 1996.

Respectfully submitted,

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APPENDIX A — OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JUNE 25, 1996

No. 94-6399

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACKIE RAY CLINE,

Plaintiff-Appellant,

v.

GEORGE W. ROGERS, individually and in his capacity as Sheriff of McMinn County and McMinn County, Tennessee,

Defendants-Appellees.

On Appeal from United States District Court for the Eastern District of Tennessee

Decided and Filed June 25, 1996

Before: MERRITT, Chief Judge; BATCHELDER, Circuit Judge; DOWD, District Judge.*

ALICE M. BATCHELDER, Circuit Judge. The plaintiff-appellant appeals from the district court's judgment dismissing with prejudice, pursuant to Fed. R Civ. P. 12(b)(6), all his claims against both defendants in this case. For the reasons that follow, we affirm.

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* The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

Appendix A

I.

The plaintiff-appellant, Jackie Ray Cline ("Cline"), alleges that in 1992, a private citizen contacted the Sheriff's Department of McMinn County, Tennessee ("the County"), and asked Sheriff George Rogers to check Cline's arrest record. According to Cline, Rogers searched state and local records and requested a computer search of National Crime Information Center ("NCIC") records of the Federal Bureau of Investigation ("FBI"). Cline alleges that Rogers disclosed to the private citizen the information Rogers obtained regarding Cline's criminal history, in violation of both Tennessee and federal law.

Cline filed this lawsuit against Rogers, individually and in his official capacity as sheriff. Cline also named the County as a defendant, alleging that improper searches of criminal records is "a routine and customary practice in McMinn County," that the County "lacks adequate controls to ensure that access to criminal records is for authorized purposes only," that the County did not have in place an adequate system to detect misuse of criminal records, that the County had provided inadequate training to prevent such abuse, and that the County had "been indifferent to the civil rights of private citizens by allowing such abuses to continue."

Cline's complaint sought damages under 42 U.S.C. § 1983 for violation of his federal civil rights. The complaint also asserted an implied private right of action under 42 U.S.C. § 3789g. Finally, the complaint alleged "violations of State and federal common law rights to privacy." Rather than answering the complaint, the defendant County filed its motion "to dismiss the Complaint against it on the ground that the Complaint fails to state a claim upon which relief can be granted against this

Defendant in that 42 U.S.C. § 3789(g) [*sic*] does not, as a matter of law, provide a private right of action to [Cline] to be maintained under 43 [*sic*] U.S.C. § 1983."

The defendant Rogers answered the complaint. Rogers apparently did not file a separate motion to dismiss. After Cline's counsel sought and received an extension of time to respond to the County's motion to dismiss the complaint, the plaintiff filed a response. Following motions by Cline's counsel for a continuance, the district court ruled on the County's motion to dismiss the complaint. In its memorandum of opinion, the court explained that all of Cline's claims against both Sheriff Rogers and the County were dismissed with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6), because Cline "undoubtedly cannot prove any set of facts consistent with his allegations which would entitle him to relief, i.e., the plaintiff is not entitled to relief despite the facts as pleaded." Further, the court held that *sua sponte* dismissal with respect to defendant Rogers was appropriate pursuant to Rule 12(b)(6) and this Court's precedent, citing *Morrison v. Tomano*, 755 F.2d 515 (6th Cir. 1985). This timely appeal followed.

II.

We review *de novo* the district court's dismissal for failure to state a claim upon which relief can be granted. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir. 1993). The court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993).

Appendix A

A. The Federal Constitutional Claim

There is no violation of the United States Constitution in this case because there is no constitutional right to privacy in one's criminal record. Nondisclosure of one's criminal record is not one of those personal rights that is "fundamental" or "implicit in the concept of ordered liberty." *See Whalen v. Roe,* 429 U.S. 589 (1977). In *Whalen,* the Supreme Court distinguished fundamental privacy interests in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education" and "individual interest in avoiding disclosure of personal matters," *see id.* at 599, finding no general constitutional right to nondisclosure of private data, *see id.* at 608-09 (Stewart, J., concurring).

Moreover, one's criminal history is arguably not a private "personal matter" at all, since arrest and conviction information are matters of public record. *See Paul v. Davis,* 424 U.S. 693 (1976) (rejecting a similar claim based on facts more egregious than those alleged here); *see also J.P. v. DeSanti,* 653 F.2d 1080 (6th Cir. 1981) (interpreting Paul in light of subsequent Supreme Court cases (*Whalen and Nixon v. Administrator,* 433 U.S. 425 (1977)) and holding that there is no general right to a constitutional balancing of government action against individual privacy absent personal rights that are "fundamental" or "implicit in the concept of ordered liberty"). Although there may be a dispute among the circuit courts regarding the existence and extent of an individual privacy right to nondisclosure of "personal matters", *see Slayton v. Willingham,* 726 F.2d 631 (10th Cir. 1984); *Fadjo v. Coon,* 633 F.2d 1172, 1176 (5th Cir. Unit B 1081) (both opining that *Paul* has been at least partially overruled by the Supreme Court's decisions in *Whalen* and *Nixon*), this circuit does not recognize

a constitutional privacy interest in avoiding disclosure of, *e.g.*, one's criminal record. *See DeSanti*, 653 F.2d at 1090 (regarding disclosure of juvenile delinquents' "social histories"); *see also Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994) (disclosure of inmate's HIV infection did not violate constitutional right of privacy).

Because there is no privacy interest in one's criminal record that is protected by the United States Constitution, Cline could prove no set of facts that would entitle him to relief; therefore, the district court correctly dismissed this claim.

B. State Constitutional Claim

The plaintiff can state no claim of a state constitutional violation in this case because Tennessee does not recognize a private cause of action for violations of the Tennessee Constitution. *See Lee v. Ladd*, 834 S.W.2d 323 (Tenn. Ct. App.), *appeal denied*, (Tenn. 1992). There, the Tennessee Court of Appeals, searching for authority to support or refute the plaintiff's claim of an implied cause of action for violations by a local police officer of her civil rights under the Tennessee Constitution, stated:

> We have held . . . that we know of no authority for the recovery of damages for a violation of the Tennessee Constitution by a state officer. *See Bennett v. Horne*, 1989 WL 86555 (No. 89-31-11, Tenn. Ct. App. . . . August 2, 1989). So far as we are able to determine, the Tennessee courts have not extended the rationale of *Bivens* [*v. Six Unknown Named Agents of the Federal*

> *Bureau of Narcotics*, 403 U.S. 388 (1971)] to give a state cause of action against a police officer for violating a person's civil rights.

Lee, 834 S.W.2d at 325. Therefore, the district court properly dismissed this claim.

C. Direct Claim for Violation of 42 U.S.C. § 3789g

1.

The plaintiff claims that the defendants violated enforceable privacy rights created in him by Congress under the Justice System Improvement Act of 1979, 42 U.S.C. §§ 3701-3797 ("the Act"). Specifically, Cline claims that the defendants violated 42 U.S.C. § 3789g, which provides for confidentiality of information under the Act. That section has four subsections: § 3789g(a) prohibits the unauthorized dissemination of research or statistical information;[1]

1. This subsection states:

> **Research or statistical information; immunity from process; prohibition against admission as evidence or use in any proceedings**
>
> Except as provided by Federal law other than this chapter, no officer or employee of the Federal Government, and no recipient of assistance under the provisions of this chapter shall use or reveal any research or statistical information furnished under this chapter by any person and identifiable to any specific private person for any purpose other than the purpose for which it was obtained in accordance with this chapter. Such information and copies thereof

(Cont'd)

§ 3789g(b) requires the Office of Justice Programs to safeguard the accuracy and security of criminal history information;[2] § 3789g(c) requires that criminal intelligence information be handled in conformity with policy standards prescribed by the

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(Cont'd)

> shall be immune from legal process, and shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action, suit, or other judicial, legislative, or administrative proceedings.

42 U.S.C. § 3789g(a).

2. This subsection states:

> **Criminal history information; disposition and arrest data; procedures for collection, storage, dissemination, and current status; security and privacy; availability for law enforcement, criminal justice, and other lawful purposes; automated systems: review, challenge, and correction of information**
>
> All criminal history information collected, stored, or disseminated through support under this chapter shall contain, to the maximum extent feasible, disposition as well as arrest data where arrest data is included therein. The collection, storage, and dissemination of such information shall take place under procedures reasonably designed to insure that all such information is kept current therein; the Office of Justice Programs shall assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful

(Cont'd)

Office of Justice Programs;[3] § 3789g(d) states that "[a]ny person violating the provisions of this section or of any rule, regulation, or order issued thereunder, shall be fined not to exceed $10,000, in addition to any other penalty imposed by law."

(Cont'd)

> purposes. In addition, an individual who believes that criminal history information concerning him contained in an automated system is inaccurate, incomplete, or maintained in violation of this chapter, shall, upon satisfactory verification of his identity, be entitled to review such information and to obtain a copy of it for the purpose of challenge or correction.

42 U.S.C. § 3789g(b).

3. This subsection states:

> **Criminal intelligence systems and information; prohibition against violation of privacy and constitutional rights of individuals**
>
> All criminal intelligence systems operating through support under this chapter shall collect, maintain, and disseminate criminal intelligence information in conformance with policy standards which are prescribed by the Office of Justice Programs and which are written to assure that the funding and operation of these systems furthers the purpose of this chapter and to assure that such systems are not utilized in violation of the privacy and constitutional rights of individuals.

42 U.S.C. § 3789g(c).

Appendix A

The district court correctly found that the only subsection of § 3789g even arguably applicable in this case is § 3789g(b), which addresses the confidentiality of criminal history information. Subsection 3789g(a) is inapplicable because that section deals with "research or statistical information." That term is not defined in the statute; however, the Department of Justice regulations define the term to mean "any information which is collected duringthe conduct of a research or statistical project and which is intended to be utilized for research or statistical purposes." 28 C.F.R. § 22.2(d). "Research or statistical project" is defined as "any program, project, or component thereof which is supported in whole or in part with funds appropriated under the Act and whose purpose is to develop, measure, evaluate, or otherwise advance the state of knowledge in a particular area." 28 C.F.R. § 22.2(c). Cline's complaint does not allege that the information Sheriff Rogers allegedly disclosed to a private citizen was information about Cline that had been collected during a research or statistical project supported with funds appropriated under the Act. Subsection 3789g(a) is therefore inapplicable in this case.

Similarly, § 3789g(c) is inapplicable here, because that subsection deals with "criminal intelligence systems and information." Those terms also are not defined in the statute but are defined by the Justice Department's regulations. "Criminal intelligence system" means "the arrangements, equipment, facilities, and procedures used for the receipt, storage, interagency exchange or dissemination, and analysis of criminal intelligence information." 28 C.F.R. § 23.3(b)(1). "Criminalintelligence information" is defined as

data which has been evaluated to determine that it:

> (i) Is relevant to the identification of and the criminal activity engaged in by an individual who or organization which is reasonably suspected of involvement in criminal activity, and
>
> (ii) meets criminal intelligence system submission criteria[.]

28 C.F.R. § 23.3(b)(3). "Criminal activity" includes, but is not limited to, "loan sharking, drug trafficking, trafficking in stolen property, gambling, extortion, smuggling, bribery, and corruption of public officials[.]" 28 C.F.R. § 23.2. The complaint in this case does not allege facts to support a claim that the defendants improperly disclosed "criminal intelligence information" regarding the plaintiff; therefore, subsection (c) of § 3789g is inapplicable.

2.

What the plaintiff's complaint does allege is that Sheriff Rogers improperly disclosed Cline's arrest record. Arrest records fall under § 3789g(b), which addresses criminal history information. The definitions section of the statute provides that:

> "criminal history information" includes records and related data, contained in an automated or manual criminal justice informational system, compiled by law enforcement agencies for the purpose of identifying criminal offenders and alleged offenders and maintaining as to such

> persons records of arrests, the nature and disposition of criminal charges, sentencing, confinement, rehabilitation, and release[.]

42 U.S.C. § 3791(a)(9). Although Cline alleges that the defendants improperly disclosed information regarding his arrest record, Cline may not maintain a private right of action under § 3789g(b), because § 3789g(b) does not create a direct, private right of action. *See Polchowski v. Gorris*, 714 F.2d 749, 751 (7th Cir. 1983). In addition, subsection (b) imposes no obligations upon these defendants; rather, the subsection mandates that the Office of Justice Programs, a federal agency, "assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes." 42 U.S.C. § 3789g(b). The subsection does entitle an individual to review and challenge inaccurate or incomplete criminal history information concerning the individual; however, Cline does not allege that the information regarding his arrest record that the defendants allegedly disclosed was inaccurate or incomplete. Even if that were the case, Cline's cause of action in that regard would be against the responsible federal agency, not state or local authorities. *See id.*

3.

Cline argues that he can bring a direct claim under 42 U.S.C. § 3789g(d), the penalty provision, because it makes reference to "any rule, regulation, or order issued" under the section, and the regulations of the Department of Justice prohibit the misuse of criminal history information by anyone having authorized access to such information. *See* 28 C.F.R. § 20.21(c)(2) ("No agency or individual shall confirm the

existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). However, even if, *arguendo*, the state and local authorities are considered an "agency" within the meaning of the Act, the regulations also provide: "Nothing in these regulations prevents . . . a criminal justice agency . . . from confirming prior criminal history record information to members of the news media *or any other person*, upon specific inquiry as to whether a named individual was arrested, detained, indicted, or whether an information or other formal charge was filed . . . ." 28 C.F.R. § 20.20(c) (emphasis added). Again, it is noteworthy that Cline does not allege that the information Sheriff Rogers allegedly disclosed was incorrect.

Congressional intent is the touchstone of whether private enforcement of a statute is permitted. Since the late 1970s, Congress has been on notice that, if it intends to create a private right of action, it had better do so expressly in the statute. The Supreme Court, mindful of separation of powers concerns, appears to have modified the four-part analysis of *Cort v. Ash*, 422 U.S. 66 (1975), upon which Cline relies, in favor of an inquiry regarding congressional intent: Did Congress intend to provide a private right of action under the statute, or did Congress intend to foreclose private enforcement of the statute? The Supreme Court has been increasingly reluctant to find an implied cause of action where Congress had the opportunity to create a private right explicitly but did not do so. *See Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). *Accord Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983) (private right of action inferred because it had been consistently recognized for more than 35 years); *Merrill Lynch, Pierce, Fenner & Smith v.*

Curran, 456 U.S. 353 (1982) (private cause of action recognized because fact that Congress had amended the statute twice without speaking to the question led to compelling inference that Congress intended to preserve implied private remedy previously recognized).

In this case, the statute at issue was part of the Justice System Improvement Act, Pub.L. 96-157, enacted December 27, 1979, at the end of the very year in which the Supreme Court issued its decisions in *Cannon* and *Touche Ross,* cautioning Congress that it must make explicit its intent to provide a private right of action, else the courts would not imply one. It is an inescapable conclusion that Congress, enacting this statute soon after having been so admonished, did not intend to create a private right of action for violation of 42 U.S.C. § 3789g. Indeed, the fact that Congress created a generalized administrative scheme, complete with a penalty provision in subsection (d) and the possibility of redress against federal agencies through the Privacy Act, 5 U.S.C. § 552a, is further proof of congressional intent not to create a private right of enforcement of this statute. The district court properly dismissed Cline's direct claim under 42 U.S.C. § 3789g.

D. Claims Under 42 U.S.C. § 1983

In Maine v. Thiboutot, 448 U.S. 1, 4-6, 100 S. Ct. 2502 2504-05 (1980), the Supreme Court established a § 1983[4]

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4. Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the

(Cont'd)

remedy for violations of a federal statute, *see Suter v. Artist M.*,__ U.S.__, __, 112 S.Ct. 1360, 1366 (1992) (citing *Thiboutot*) but since then has held that no such remedy exists if "(1) the statute does not create enforceable rights, privileges, or immunities within the meaning of § 1983, or (2) Congress has foreclosed such enforcement of the statute in the enactment itself." *Wilder v. Virginia Hosp. Assn*, 496 U.S. 498, 508, 110 S.Ct. 2510, 2517 (1990) (internal quotation marks and brackets omitted) (quoting *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423, 107 S.Ct. 766, 770 (1987)); *Wright*, 479 U.S. at 423, 107 S.Ct. at 770 (recognizing these two exceptions) (citing *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531 (1981); *Middlesex County Sewerage Auth. v. National Sea Clammers Assn*, 453 U.S. 1, [19,] 101 S. Ct. 2615 [,2626] (1981) (declining to consider whether the acts in question created rights, privileges or immunities under § 1983 when Congress had foreclosed a § 1983 remedy under the acts)), *quoted in Suter*, __ U. S. at __ 112 S.Ct. at 1366.[5]

(Cont'd)

> jurisdiction thereof to the deprivation of any *rights*, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (emphasis added).

5. Reading only *Suter* could lead one to believe a § 1983 action is unavailable as a remedy for a violation of a federal statute only "where Congress has foreclosed such enforcement of the statute in the enactment itself *and* where the statute did not create enforceable rights, privileges or immunities[,]" __ U.S. at __ 112 S.Ct. at 1366 (emphasis added) (quoting *Wright*), *i.e.*, only where both conditions are met. *Wilder*, *Wright*, and

(Cont'd)

To determine whether the first of these two exceptions applies, the Court has developed a three part test:

> (1) Was the provision in question intended to benefit the plaintiff?
>
> (2) Does the statutory provision in question create binding obligations on the defendant governmental unit, rather than merely expressing congressional preference?
>
> and (3) Is the interest the plaintiff asserts specific enough to be enforced judicially, rather than being "vague and amorphous"?

Wayne v. Village of Sebring, 36 F.3d 517, 529 (6th Cir. 1994) (citing *Wilder*, 496 U.S. at 509, 110 S.Ct. at 2517), *cert. denied*, __U.S.__115 S. Ct. 2000 (1995); *Wood v. Thompkins*, 33 F.3d 600, 604-05 (6th Cir. 1994)(citing *Wilder*); *see also "Tony" L. ex rel. Simpson v. Childers*, 71 F.3d 1182, 1188 (6th Cir. 1995) (citing *Wilder*), *cert. denied*, __ U.S. __, __ S. Ct. __ (1996); *Loschiavo v. City of Dearborn*, 33 F.3d 548, 551 (6th Cir. 1994) (citing *Wilder*), *cert. denied*, __U.S. __, 115 S. Ct. 1099 (1995)[6]

(Cont'd)

Middlesex County reveal that such a belief would be mistaken. The presence of either exception does away with a § 1983 claim.

6. A plaintiff bears the burden of proving that the first exception does not apply, while a defendant bears the burden of proving that the second exception does apply. *Wayne*, 36 F.3d at 529 (citing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106, 107, 110 S.Ct. 444, 448, 449 (1989)); *Wood*, 33 F.3d at 605 (citing *Golden State Transit*).

When a statue imposes no direct obligations on the states, and instead places "the onus of compliance with the statute's substantive provisions on the federal government," there is no § 1983 claim. *Audette v. Sullivan,* 19 F.3d 254, 256-57 (6th Cir. 1994) (quoting *Stowell v. Ives,* 976 F.2d 65, 70 (1st Cir. 1992)); *Clifton v. Schafer,* 969 F.2d 278, 283-85 (7th Cir. 1992).

As explained *supra,* only subsection (b) of 42 U.S.C. § 3789g is potentially implicated by the allegations of this plaintiff's complaint, and that subsection imposescompliance obligations only on a federal agency, not upon these defendants. Further, the purpose of § 3789g(b) is to provide for the maintenance and accuracy of criminal history information, with a specific provision included entitling "an individual who believes that criminal history information concerning him contained in an automated system is inaccurate, incomplete, or maintained in violation" of the statute "to review such information and to obtain a copy of it for the purpose of challenge or corrections." 42 U.S.C. § 3789g(b). The only privately enforceable right created by this subsection of the statute in an individual such as Cline is the right to receive a copy of criminal history information maintained pursuant to the statute for his review and possible correction in the event of erroneous information. Title 42 U.S.C. § 3789g does not provide a privately-enforceable federal right to nondisclosure of accurate criminal history information; therefore, Cline's § 1983 claims fail. Rather than creating a federal right which may be privately enforced either directly under the statute or through an action under § 1983, Congress created an administrative schemeintended to assure that criminal history information, criminal intelligence information, and research and statistical information be used only for the purposes for which it was collected. The remedy for violations is provided

by the statute itself, *see* 42 U.S.C. § 3789g(d), and, with respect to federal agencies, by the Privacy Act of 1974, 5 U.S.C. § 552a(a)(1). The provision of these remedies is further proof that Congress intended to foreclose private enforcement of § 3789g. *See Polchowski*, 714 F.2d at 752. The district court properly dismissed Cline's § 1983 claims.

III.

Finally, Cline argues that the district court was too hasty in dismissing his complaint because "[v]ery little discovery had been undertaken at the time," the district court assumed that only subsection (b) of § 3789g applied in this case, and Cline might have discovered that the defendants had actually violated another subsection, or that "a contract existed between the Defendants and the FBI — the agency that controls the NCIC data base — and that he may have a cause of action under a contract theory." Of course, Cline's complaint does not make such allegations, and he appears to have made no effort to amend it. Although "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *see Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), it is "not proper to assume the [plaintiff could] prove facts [he] had not alleged or that the defendants had violated applicable laws in ways that had not been alleged." *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983); *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1983); *Brennan v. Chestnut*, 777 F. Supp. 1469, 1472-73 (D. Minn. 1991), *aff'd*, 973 F.2d 644 (8th Cir. 1992).

Moreover, although Cline argues that the district court's dismissal of his complaint was "premature" and that he should have been afforded the benefit of oral argument on the motion to dismiss, it was not an abuse of the district court's discretion to dismiss the complaint under Rule 12(b)(6) without first hearing oral argument. *See Mann v. Conlin*, 22 F.3d 100, 103 (6th Cir. 1994); Fed. R. Civ. P. 78.

IV.

Because the plaintiff in this case can prove no set of facts, consistent with his pleadings, that would entitle him to relief on any of his claims, the district court did not err in dismissing with prejudice the entire complaint against both defendants. The district court's judgment is **AFFIRMED.**

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TENNESSEE AT CHATTANOOGA FILED SEPTEMBER 12, 1994

1:93-cv-386

JACKIE RAY CLINE,

Plaintiff,

v.

GEORGE W. ROGERS, INDIVIDUALLY and IN HIS CAPACITY AS SHERIFF OF MCMINN COUNTY, and MCMINN COUNTY,

Defendants.

ORDER AND JUDGMENT

In accordance with the accompanying memorandum, the defendant McMinn County's motion to dismiss (Court File No. 5) pursuant to Fed. Civ. P. 12(b)(6) is **GRANTED**, and all claims in this action against McMinn County are **DISMISSED WITH PREJUDICE.** Also for the reasons stated in the accompanying memorandum, all claims in this action against defendant George W. Rogers are **DISMISSED WITH PREJUDICE.** No claims remain for adjudication in this action.

SO ORDERED.

ENTER:

s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

Appendix B

Entered as a Judgment
this 12th day of Sept, 1994,
in Order Book 62, Page 90,
Pursuant to Rule 58, Fed. R. Civ. P.

R. MURRAY HAWKINS, CLERK

By s/ **Cyndee Helder**
Deputy Clerk

APPENDIX C — MEMORANDUM OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TENNESSEE AT CHATTANOOGA FILED SEPTEMBER 12, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

1:93-cv-386

JACKIE RAY CLINE,

Plaintiff,

v.

GEORGE W. ROGERS, INDIVIDUALLY and IN HIS CAPACITY AS SHERIFF OF MCMINN COUNTY, and MCMINN COUNTY,

Defendants.

MEMORANDUM

This action involves a county sheriff's disclosure of criminal history information about the plaintiff. The plaintiff asserts claims under the U.S. Constitution, 42 U.S.C. § 3789g, 42 U.S.C. § 1983, and the Tennessee Constitution. Before the Court is defendant McMinn County's motion to dismiss pursuant to Fed. R. Civ. P. 12b(6). for the reasons that follow, McMinn County's motion will be**GRANTED.**

Appendix C

I. Facts.

In late 1992, a private citizen went to the McMinn County sheriff's Department and asked the sheriff, defendant George Rogers, to check the criminal record of the plaintiff, Jackie Ray Cline. Rogers allegedly searched state and local records and requested a computer search of Federal Bureau of Investigation records. According to Cline, Rogers disclosed the information he obtained on Cline to the inquiring citizen. In complying with the request for information on Cline, Rogers purportedly violated Tennessee Bureau of Investigation rules regarding disclosure of criminal record information.

In this action Cline asserts five claims against Rogers and McMinn County: (1) a claim under 42 U.S.C. § 1983 for violation of 42 U.S.C. § 3789g, (2) a claim under 42 U.S.C. § 3789g for violation of the same, (3) a claim under 42 U.S.C. § 1983 for violation of his constitutional right of privacy, (4) a claim directly under the Constitution for violation of his right of privacy, and (5) a claim for violation of his right of privacy under the Tennessee Constitution. McMinn County moves the Court to dismiss the plaintiff's claims against it for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12b(6).

II. Standard of Review

In considering a Fed. R. Civ. P. 12(b)(6) motion, the Court regards all well-pleaded allegations in the complaint as true, construing them in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Jones v. City of Carlisle, Ky.*, 3 F.3d 945, 947 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1218 (1994); *Song v. City of Elyria, Ohio*, 985 F.2d 840, 843 (6th Cir. 1993); *Collins*

v. Nagle, 892 F.2d 489, 493 (6th Cir. 1989). Dismissal of a complaint under Fed. R. Civ. P. 12b(6) for failure to state a claim is warranted only when the plaintiff undoubtedly cannot prove any set of facts consistent with his allegations which would entitle him to some relief, i.e., the plaintiff is not entitled to relief despite the facts as pleaded. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Collins*, 892 F.2d at 493.

III. Analysis

A. Section 1983 claim for violation of 42 U.S.C. § 3789g

Under 42 U.S.C. § 1983, a private cause of action exists for "the deprivation of any rights, privileges or immunities secured by the Constitution and laws [of the United States]." 42 U.S.C. § 1983. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the U.S. Supreme Court determined that § 1983 provides a private cause of action for violations of federal statutes as well as the Constitution. *Thiboutot*, 448 U.S. at 4. In decisions subsequent to *Thiboutot*, the Supreme Court has determined that two exceptions exist to this rule. A Plaintiff alleging a violation of a federal statute may enforce the statute under § 1983 unless: (1) " 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' ", or (2) when " 'Congress has foreclosed such enforcement . . . in the enactment itself.' " *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 (1990) (quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987)); *see Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989); *Wood v. Tompkins*, __ F.3d __, No. 93-3684, 1994 WL 462382, at *3 (6th Cir. Aug. 29, 1994); *Audette v. Sullivan*, 19 F.3d 254, 256 (6th Cir. 1994).

Appendix C

To determine whether a provision creates an "enforceable right" under the first exception, the Court must apply a three-part test. The Court must ask (1) whether the provision " 'was intend[ed] to benefit the putative plaintiff.' " *Wilder*, 496 U.S. 509 (quoting *Golden State*, 493 U.S. at 106)). If answered in the affirmative, the provision creates an enforceable right unless (2) "it reflects merely a 'congressional preference' for a certain kind of conduct rather than a binding obligation on the governmental unit," *id.* (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 19 (1981)), or unless (3) "the interest the plaintiff asserts is 'too vague and amorphous' such that it is 'beyond the competence of the judiciary to enforce.' " *Id.* (quoting *Golden State*, 493 U.S. at 106) (some internal quotations omitted); *see Wood*, 1994 WL 462382, at *3 (setting forth three-part test). The plaintiff bears the burden of proof under this exception. *Golden State*, 493 U.S. at 106; *Wood*, 1994 WL 462382, at *3.

With respect to the second exception, Congress may foreclose enforcement under § 1983 by "providing a comprehensive enforcement mechanism for protection of a federal right." *Golden State*, 493 U.S. at 106 (internal quotations omitted); *see Wood*, 1994 WL 462382, at *3. That the statute merely makes available administrative protections is not sufficient. *Golden State*, 493 U.S. at 106; *Wood*, 1994 WL 462382, at *3. Instead, the "statutory framework must be such that allowing a plaintiff to bring a § 1983 action would be inconsistent with Congress' carefully tailored scheme." *Golden State*, 493 U.S. at 107 (internal quotations omitted). The defendant bears the burden of proof under this exception. *Id.*; *Wood*, 1994 WL 462382, at *3.

At issue in this case is whether the plaintiff may bring a cause of action under § 1983 for a violation 42 U.S.C. § 3789g.

Before making this determination, however, the Court must determine which subsection of § 3789g that the plaintiff claims the defendants violated. The plaintiff does not make this clear in his complaint. This determination is important because the Supreme Court has instructed that "each statute must be interpreted by its own terms" in determining whether the statute gives rise to a right enforceable under § 1983. *Suter v. Artist M.*, __ U.S. __, 112 S. Ct. 1360, 1367 n.8, 118 L. Ed. 2d 1, 13 n.8 (1992); *see Wood*, 1994 WL 462382, at *9 (considering subsections of 42 U.S.C. 1396n(c)(2) separately and concluding that some subsections give rise to enforceable rights under § 1983 while others do not).

Section 3789g generally addresses the confidentiality of information disseminated pursuant to the Justice System Improvement Act, Pub. L. No. 96-157, 93 Stat. 1167 (1979), which amended the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3701-3797 (collectively, "the Act"). Subsection (a) of section 3789g prohibits officers or employees of the Federal Government or recipients of assistance under the Act from revealing, for any purpose other than for which it was obtained under the Act, "research and statistical information" that is identifiable to any specific person. *Id.* § 3789g(a). Subsection (b) concerns "criminal history information" and provides that "the Office of Justice Programs shall assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes." *Id.* § 3789g(b). Finally, subsection (c) concerns "criminal intelligence systems and information" and provides that all criminal intelligence systems operating under the Act shall operate in conformance with policy standards which, among other things, assure that the "systems are not utilized in

violation of the privacy and constitutional rights of individuals." *Id.* § 3789g(c).

"Criminal history information" is defined under the Act as including "records and related data, contained in an automated or manual criminal justice informational system, compiled by law enforcement agencies for the purpose of identifying criminal offenders and alleged offenders and maintaining as to such persons records of arrests, the nature and disposition of criminal charges, sentencing, confinement rehabilitation and release." *Id.* § 3791(a)(9). "Research or statistical information" and "criminal intelligence systems and information" are not defined under the Act. Department of Justice regulations, promulgated in part under the Act, however, do define or clarify the terms.

Under Department of Justice regulations, "research or statistical information" is defined as "any information which is collected during the conduct of a research or statistical project and which is intended to be utilized for research or statistical purposes." 28 C.F.R. § 22.2(d) (1993). The term "research or statistical project" means "any program, project, or component thereof which is supported in whole or in part with funds appropriated under the Act and whose purpose is to develop, measure, evaluate, or otherwise advance the state of knowledge in a particular area." *Id.* §22.2(c).

The Department of Justice regulations define criminal "intelligence systems" as "the arrangement[,] equipment, facilities, and procedures used for the continuing storage, exchange and analysis of criminal intelligence data." *Id.* § 23.3(b). Although the Department of Justice regulations do not define "criminal intelligence information," they do clarify

the term by explaining that it refers to ongoing criminal *activity* typically related to such crimes as loan sharking, narcotics, trafficking in stolen property, gambling, extortion, smuggling, bribery, and corruption of public officials. *Id.* § 23.2.

After reviewing the record and applicable law, the Court concludes that the only subsection of 3789g arguably applicable in present case is subsection (b), the subsection that addresses the confidentiality of criminal history information. The plaintiff alleges in his complaint that a private citizen requested that defendant Rogers conduct a search to find out if the plaintiff had ever been arrested. Rogers allegedly conducted the search and disclosed to the citizen the plaintiff's criminal record. A search of a person's arrest records is consistent with a search of a person's "criminal history." Indeed, the definition of "criminal history information" includes "records of arrests[ ] and the nature and disposition of criminal charges." 42 U.S.C. § 3791(a)(9). The plaintiff does not allege in this case that the private citizen and Rogers were collecting information pursuant to a research or statistical project and intended to utilize the information for research or statistical purposes, as contemplated under § 3789g(a). Nor does the plaintiff allege that Rogers provided "criminal intelligence information" pertaining to some alleged criminal activity by the plaintiff, as contemplated under § 3789g(c). For these reasons, therefore, the plaintiff could only claim in this action that the defendants violated the "criminal history information" provision of § 3789g(b).

Whether § 1983 accords a private cause of action to plaintiffs alleging a violation of § 3789g(b) is not a question of first impression. In *Polchowski v. Gorris*, 714 F.2d 749 (7th Cir. 1983), a case in which the defendant allegedly revealed "certain

statistical *and* criminal history information about the plaintiff, the U.S. Court of Appeals for the Seventh Circuit determined that § 1983 does not accord a private cause of action for violations of § 3789g(b) or § 3789g(a). With respect to subsection (b), the court concluded that the subsection does not create an enforceable right. The court reasoned that the subsection is administrative in nature in that it imposes obligations on a federal actor to assure that the information is only used for the purposes for which it was collected. *Polchowski*, 714 F.2d at 751. With respect to subsection (a), the court concluded that the subsection does create an enforceable right but is not actionable under § 1983 because Congress had foreclosed such an action by creating a comprehensive remedial scheme under the Privacy Act of 1974, 5 U.S.C. 552a, a statute separate from § 3789g. *Id.* at 1752.

Although this Court need not determine, for reasons already discussed, whether the Seventh Circuit reached the correct result with regard to § 3789g(a), the Court reaches the same result as the Seventh Circuit with regard to § 3789g(b). As previously noted, a statute does not confer an enforceable right if it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the defendant governmental unit. *Wilder*, 496 U.S. at 509; *Woods*, 1994 WL 562382, at *3. The defendant governmental unit in this case — McMinn County — has no binding obligations under § 3789g(b). Section 3789g(b) only imposes obligations on the Office of Justice Programs, which is a branch of the U.S. Department of Justice. 42 U.S.C. §§ 3711, 3789g(b). The Sixth Circuit has made clear that a plaintiff has no § 1983 right of action against a state actor for the violation of a federal statute where the statute is essentially administrative in nature and *imposes an obligation exclusively upon federal, not state,*

actors. Woods, 1994 WL 462382, at *7; *Audette v. Sullivan*, 19 F.3d 254, 257 (6th Cir. 1994). Whether a state or federal actor has an obligation under a statute depends upon whom the statute places the "onus of compliance." *Woods*, 1994 WL 462382, at *7; *Audette*, 19 F.3d at 256-57. In this case, the onus of compliance with § 3789g(b) clearly falls on the Office of Justice Programs. *See* 42 U.S.C. § 3789g(b) ("[T]he Office of Justice Programs shall assure that the security and privacy of all information is adequately provided for. . . ."). Because the onus of compliance falls on a federal, rather than state, actor, § 3789g(b) cannot confer a right enforceable under § 1983.

Furthermore, the Court agrees with the Seventh Circuit that § 3789g(b) is essentially administrative in nature. Although the subsection does provide that the "Office of Justice Programs shall assure the security and privacy of all information is adequately provided for," the subsection does not *entitle* individuals to privacy rights with respect to their criminal history, nor does it reference *individuals'* privacy interests. The subsection, therefore, may be fairly read to impose only a generalized duty on the Office of Justice Programs, rather than create a private, enforceable right. *See Suter*, __ U.S. at __, 112 S. Ct. at 1370, 118 L. Ed. 2d at 16 (concluding that language in statute requiring a state to have a plan providing that "reasonable efforts" will be made to prevent or eliminate the need for removing a child from his home imposes only a generalized duty upon the state rather than creates an enforceable right).

Finally, it is worthy of noting that § 3789g(d) sets forth penalties for persons who violate § 3789g. This subsection provides that "[a]ny person violating the provisions of this section, or any rule, regulation, or order issued thereunder, shall

be fined not to exceed $10,000, in addition to any other penalty imposed by law." *Id.* § 3789g(d). Although this subsection may not amount to a comprehensive enforcement mechanism that conclusively evidences congressional intent to foreclose a § 1983 cause of action for a violation of § 3789g, it does show that the absence of a § 1983 cause of action for a violation of the section does not render the section a dead letter. *See Suter*, __ U.S. at __, 112 S. Ct. at 1368-69, 118 L. Ed. 2d at 14 (observing that 42 U.S.C. § 671(a)(15) is not a dead letter without a private cause of action under § 1983 in light of certain statutory provisions enabling the Secretary of Health and Human Services to take actions against states).

For all of the foregoing reasons, therefore, the Court concludes that § 1983 does not accord the plaintiff a private cause of action for a violation of § 3789g(b). His § 3789g claim brought pursuant to § 1983 will therefore be **DISMISSED.**

B. Claim Directly Under § 3789g

For similar reasons, plaintiff's claim directly under § 3789g(b) will also be **DISMISSED**. To prove the existence of an implied cause of action under a statute, the plaintiff must prove that congress intended to make a private remedy available to enforce the provisions of the statute. *Suter*, __ U.S. at __, 112 S. Ct. at __, 118 L. Ed. 2d at 16; *see Smith v. Dearborn Fin. Servs., Inc.*, 982 F.2d 976, 980 (6th Cir. 1993) (noting that congressional intent is the dispositive factor in determining whether a private cause of action is implicit in a statute); *see also Cort v. Ashe*, 422 U.S. 66, 78 (1975) (setting forth familiar four-part test). As this Court has already determined, § 3789g(b) does not create an enforceable right for the plaintiff in part because it only imposes a generalized duty upon the

Office of Justice Programs. Additionally, § 3789g provides its own enforcement mechanism by way of the penalties that may be imposed under § 3789g(d). In light of these statutory provisions, the Court concludes that Congress did not intend to enforce § 3789g(b) by way of private rights of action. *Cf. Suter*, __ U.S. at __, 112 S. Ct. at 1370, 118 L. Ed. 2d at 16 ("Having concluded that § 671(a)(15) does not create a federal enforceable right . . . under § 1983, the [implied right of action claim] may be disposed of quickly").

C. Constitutional Claim

The plaintiff also claims that his constitutional right of privacy was violated by the disclosure of his criminal history information. The plaintiff brings this claim both directly under the Constitution and pursuant to § 1983.

The plaintiff's claim is without merit. In the case of *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981), the U.S. Court of Appeals for the Sixth Circuit determined whether the dissemination of juvenile deliquents' "social histories" violated the juveniles' constitutional rights of privacy. The Sixth Circuit acknowledged that the Supreme Court had made "isolated statements" in *Whalen v. Roe*, 429 U.S. 589 (1977) and *Nixon v. Administrator of General Servs.*, 433 U.S. 425 (1977) that, when read out of context, lent support to the juveniles' claim, but the Sixth Circuit ultimately held that "the Constitution does not encompass a general right to nondisclosure of private information." *DeSanti*, 653 F.2d at 1090.

In the recent case of *Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994), the Sixth Circuit confronted the issue of whether the

disclosure of an inmate's HIV infection violated the inmate's constitutional right of privacy. The Sixth Circuit followed *DeSanti* and held that the inmate's constitutional right of privacy was not violated by the disclosure. *Wingginton*, 21 F.3d at 740. The Court found that the inmate's privacy interest in his HIV infection was indistinguishable from the juveniles' privacy interest in their social histories. *Id.*

This Court concludes that *DeSanti* and *Wingginton* control the present case. The plaintiff's privacy interest in his criminal background is no greater than the inmate's privacy interest in his HIV infection or the juveniles' privacy interest in their social histories. Accordingly, plaintiff's claim his constitutional right of privacy was violated will be **DISMISSED.**

Because the Court makes this determinations based on the substantive constitutional right of privacy, it matters not whether plaintiff brings his claim directly under the Constitution or pursuant to § 1983. The result is the same under either approach. His claim directly under the Constitution, therefore, will also be **DISMISSED.**

D. Tennessee Constitutional Claim

The plaintiff also claims that the disclosure of his criminal background violates the Tennessee Constitution. Tennessee courts, however, do not recognize a private cause of action to recover damages for violations of the state constitution. *See Lee v. Ladd*, 834 S.W.2d 323, 325 (Tenn. Ct. App. 1992) ("We have held . . . in prior cases that we know of no authority for the recovery of damages for a violation of the Tennessee Constitution by a state officer."); *see also Bennett v. Horne*, No.

89-31-II, 1989 WL 86555, at *2 (Tenn. Ct. App. Aug. 2, 1989) ("This court knows of no authority for the recovery of damages for a violation of article I, section 7 of the Tennessee Constitution."). Accordingly, the plaintiff's claim under the state constitution will be **DISMISSED.**

IV. Conclusion

For the foregoing reasons, defendant McMinn County's motion to dismiss pursuant to Fed. R. Civ. P. 12(b) will be **GRANTED.**

Although only defendant McMinn County moves for dismissal of this action, the Court raises the motion *sua sponte* with respect to the other defendant, Sheriff Rogers. A court may raise a Rule 12(b)(6) motion *sua sponte* when the court:

> "(1) allow[s] service of the complaint upon the defendant; (2) notifi[ies] all parties of its intent to dismiss the complaint; (3) give[s] the plaintiff a chance to either amend his complaint or respond to the reasons stated by the district court in its notice of intended *sua sponte* dismissal; (4) give the defendant a chance to respond or file an answer or motions; and (5) if the claim is dismissed, state it reasons for dismissal."

Morrison v. Romano, 755 F.2d 515, 516 (6th Cir. 1985) (quoting *Tingler v. Marshall*, 716 F.2d 1109, 1112 (6th Cir. 1983)). A *sua sponte* dismissal under Rule 12(b)(6) is not necessarily invalid because of a lack of service on the defendant or a failure to provide the defendant an opportunity to respond. *Id.* at 517.

Appendix C

In this case, the requirements of *Tomano* are met. Although the Court did not notify the plaintiff of its intent to dismiss the complaint with respect to defendant Rogers, McMinn County's motion to dismiss put the plaintiff on notice that his complaint was subject to complete dismissal.[1] This is especially true considering that the plaintiff brings the same claims against both defendants in this action and that he sues Rogers, in part, in his official capacity as Sheriff of McMinn County. A suit against Rogers in his official capacity is indistinguishable from a suit against the county itself. Furthermore, in light of McMinn County's motion, the plaintiff has had an adequate opportunity to amend or respond to McMinn County's proferred reasons for dismissal. Although it is apparent that defendant Rogers will not have an opportunity to respond to the Court's intended dismissal, the Court is satisfied, in accordance with *Tomano*, that Rogers will not be unduly prejudiced by the dismissal.

Thus, for the same reasons that the Court concludes that the plaintiff's claims against McMinn County will be **DISMISSED**, the Court also concludes that plaintiff's claims against Rogers will be **DISMISSED.**

An order will enter.

s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

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1. Although McMinn County only argued in support of its motion that the plaintiff was not entitled to recover on his claim that McMinn County had violated 42 U.S.C. § 3789g, the motion put the plaintiff on notice that his other claims against McMinn County were subject to dismissal. Indeed, McMinn County moved that the Court dismiss the plaintiff's "complaint."